LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969
No. 971

STATE OF CALIFORNIA,

Petitioner,

vs.

LEON PHILLIP BELOUS,

Respondent.

Respondent's Opposition to Petition for Writ of Certiorari

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 625-9720

IN THE

Supreme Court of the United States

October Term, 1969
No. 971

STATE OF CALIFORNIA,

Petitioner,

vs.

LEON PHILLIP BELOUS,

Respondent.

Respondent's Opposition to Petition for Writ of Certiorari.

Certiorari should be denied because this case falls under "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, (this Court's) jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." (*Fox Film Corporation v. Muller,* 296 U.S. 207, 210.)

It is clear that the California Supreme Court held former Penal Code §274 invalid under the due process clause (Article I, §13) of the California Constitution.[1] As seen from the quotation above from *Fox Film,* that it likewise felt the statute to be violative of the Fourteenth Amendment does not give this Court juris-

[1]". . . No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

diction. This case falls squarely within *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487.

In his petition for hearing in the court below, respondent here urged as his first point that (p. 6):

> "CALIFORNIA PENAL CODE SECTION 274 AS APPLIED TO THE DEPARTMENT OFFENDS AGAINST THE GUARANTEES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND AGAINST ARTICLE I, SECTION 13 AND 19 OF THE CALIFORNIA CONSTITUTION"

And in his Supplemental Brief and Reply to Brief Amici Curiae, respondent argued (p. 5):

> "CALIFORNIA'S ANTI-ABORTION STATUTE, PENAL CODE §274, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE CALIFORNIA (Article I, §§ 11, 13 and 21) and UNITED STATES (14th Amendment) CONSTITUTIONS"

Just as did the Indiana Supreme Court in *Jankovich, supra,* so did the California Supreme Court here: make its analysis in the light of both federal and state constitutions. Thus, the Court said (p. 5, Appx. to Pet. for Writ of Certiorari), "We have concluded that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not *violate legislative intent* and that is sufficiently certain to satisfy *due process requirements,* without improperly infringing on fundamental constitutional rights." (Emphasis added). And (p. 6, Appx. to Pet.) " 'The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well-estab-

lished element of the guarantee of due process of law [quoting further from and citing decisions of this Court]' *Such also is the law of the State of California.* (Emphasis added.) (*People v. McCaughan,* 49 Cal. 2d 409, 414 [317 P. 2d 974].)" [Name of case italicized in original.]

Further, the California Supreme Court said (Appx. to Petition, 9-10), "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's *and this court's* repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex. (emphasis added) (citing decisions of this and the California courts). That such a right is not enumerated in either the United States *or California Constitutions* is no impediment to the existence of the right." (citing decisions of both courts as well as that of a California Court of Appeal).

Later in its opinion (Appx. to Petition, 15) the California Supreme Court in support of the proposition that "Constitutional concepts are not static," cited a decision of this Court, one of its own and one of the intermediate state appellate court.

And, finally, the court below stated as additional ground for its decision that (Appx. to Petition, 23) the statute delegated legislative authority to the individual, the doctor, director concerned, citing *inter alia,* two, and quoting from one, of its own decisions.

Thus, to paraphrase *Jankovich, supra,* 379 U.S. at 491-492, "nothing in the (California) court's opinion suggests that its conclusion . . . flows from a federal rather than a state source. Indeed, the organization

and language of the opinion indicates that, at the least, state law is an equal ground of decision. . . . [T]here is no intimation that the conclusion . . . is based less forcefully on the (California) Constitution than on the Fourteenth Amendment. (Par.) In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. . . . Under (the) settled decisions (of this Court) the state ground in this case must be regarded as an independent and adequate ground of decision . . ."

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Respondent.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 12 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 971

STATE OF CALIFORNIA,

Petitioner,

vs.

LEON PHILLIP BELOUS,

Respondent.

BRIEF OF AMICI CURIAE (Hereafter Listed) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HERMAN F. SELVIN,
270 North Canon Drive,
Beverly Hills, Calif. 90210,
Attorney for Amici Curiae.

J. J. BRANDLIN,
411 West Fifth Street,
Los Angeles, Calif. 90013,

THOMAS J. ARATA,
717 College Avenue,
Santa Rosa, California,

RICHARD D. ANDREWS,
1111 Fulton Mall,
Fresno, Calif. 93721,

CYRIL A. COYLE,
1005 8th Street,
Sacramento, California,

JAMES S. DE MARTINI,
115 North Sutter,
Stockton, California,

JOHN F. DUFF,
593 Market Street,
San Francisco, Calif. 94105,

WILLIAM R. KENNEDY,
Professional Building,
Monterey, Calif. 93940,

RICHARD G. LOGAN,
436 - 14th Street,
Oakland, Calif. 94612,

JOHN C. McDEVITT,
530 Broadway,
San Diego, Calif. 92101,

Of Counsel for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

Interest of Amici Curiae 1

Argument 3

I.

Anti-Abortion Statutes, Identical or Similar in Import to California's, Are of Long Standing and a Part of the Statutory Law of Every State in the Union, Save One. The Decision Sought to Be Reviewed Threatens Their Future Existence and Efficacy. The Question Raised Here, Therefore, Is of Great Public Importance 3

II.

The Question Whether the California Statute Is Void for Vagueness Is a Substantial One .. 5

III.

The Coincidence Between a Statute for Which There Is a Temporal Basis and the Teaching of Some Religious Sect Is Not an Establishment of Religion 10

Conclusion 12

INDEX TO APPENDICES

Appendix I. State and Territorial Abortion Statutes 1

Appendix II. Names of Amici Curiae 7

TABLE OF AUTHORITIES CITED

Cases	Page
Adderly v. Florida, 385 U.S. 39	8
Boyce Motor Lines v. United States, 342 U.S. 337	7
Cleveland v. United States, 329 U.S. 14	4, 10
Edgington v. Fitzmaurice, 29 Ch. D. 459	7
Everson v. Board of Education, 330 U.S. 1	12
Ginsberg v. New York, 390 U.S. 629	8
Jacobson v. Massachusetts, 197 U.S. 11	4
McGowan v. Maryland, 366 U.S. 420	11, 12
Muller v. Oregon, 208 U.S. 412	4
Nash v. United States, 229 U.S. 373	6
Omaechevarria v. Idaho, 246 U.S. 343	6
People v. Arbanel, 239 Cal.App.2d 31, 48 Cal.Rptr. 336	7
People v. Ballard, 167 Cal.App.2d 803, 335 P.2d 204	7
People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29	7
Prince v. Massachusetts, 321 U.S. 158	10
Reynolds v. United States, 98 U.S. 145	10
Roth v. United States, 354 U.S. 476	6
School District of Abington v. Schempp, 374 U.S. 203	10, 12
Screws v. United States, 325 U.S. 91	8
United States v. Alford, 274 U.S. 264	6
United States v. Harriss, 347 U.S. 612	8
United States v. Ragen, 314 U.S. 513	8
United States v. Wurzbach, 280 U.S. 396	6
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86	6
West Virginia State Board of Education v. Barnette, 319 U.S. 624	10

Miscellaneous Page

Civil Liberties (Publication of the American Civil Liberties Union), December, 1969, p. 6 5

Statutes

Maryland Acts (1968), Ch. 470, Sec. 1 3

Maryland Annotated Laws (1957), Sec. 3 3

United States Constitution, Fourteenth Amendment 4, 10

Textbook

Pilpel and Norwick, When Should Abortion Be Legal (The Public Affairs Committee, (1969), pp. 6-8 11

IN THE

Supreme Court of the United States

October Term, 1969
No. 971

STATE OF CALIFORNIA,

Petitioner,

vs.

LEON PHILLIP BELOUS,

Respondent.

BRIEF OF AMICI CURIAE (Hereafter Listed) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Interest of Amici Curiae.

Amici Curiae—some thirty-one in number, whose names and professions are given in Appendix II of this brief—are respectively, clergymen and doctors of medicine. Execpt for two of them, they appeared in the Supreme Court of the State of California as *amici curiae* in support of the petitioner here. They were impelled to do so there, as they are here, for these reasons: First, the teachings of the respective churches and congregations with which the clergymen are affiliated are opposed to the practice of voluntary or induced termination of an existing pregnancy; and from time to time various demands are made upon the doctors for advice and

aid in respect of an unwanted pregnancy. As a consequence, the position of the practice in and its treatment by the law is a matter of substantial professional interest to them; and, second, it has been suggested in the course of this cause that statutes prohibiting the practice of abortion, like the one here involved, amount to an unconstitutional establishment of religion—a suggestion which directly affects the practice by *amici curiae* of their professions, and which, in their view is untrue and unsound. They desire to be heard in respect of that suggestion and to oppose its acceptance into the law.

ARGUMENT.

I.

Anti-Abortion Statutes, Identical or Similar in Import to California's, Are of Long Standing and a Part of the Statutory Law of Every State in the Union, Save One. The Decision Sought to Be Reviewed Threatens Their Future Existence and Efficacy. The Question Raised Here, Therefore, Is of Great Public Importance.

With the exception of Maryland, every State of the Union, the District of Columbia, and the territories of Puerto Rico, Guam, Samoa, Virgin Islands and Canal Zone have a statute proscribing abortion.[1] Of these, all but four, like California, except from the proscription an abortion or miscarriage necessary to preserve the mother's life.[2] In virtually every instance the language of the exception is identical with the California language; such variations as exist are, in the great preponderance of instances, no more than matters of style, adding nothing to the certainty of the language or assurance to the physician that his estimate or judgment of need may not be overcome by a jury verdict.[3]

---

[1]Maryland had such a statute until 1968 [*Annotated Laws of Maryland, 1957,* §3], when it was repealed. [*Maryland Acts, 1968,* c. 470, §1.]

[2]The statutes are cited and their relevant provisions quoted in Appendix I to this brief.

[3]The language of the California exception is ". . . unless the same is necessary to preserve her life . . ." Twenty of the statutes are identical to California's. In seventeen others the language is identical save for differences that are merely syntactic or verbal—*e.g.*, "the miscarriage" instead of "the same;" or "shall have been" instead of "is;" or "mother's" instead of "her;" or "save" instead of "preserve." Four statutes have no such exception. In the remaining thirteen (Maryland has no statute) the language is different from California's, but either ex-

(This footnote is continued on the next page)